**BEFORE THE CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU OF THE FEDERAL COMMUNICATIONS COMMISSION**

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| **IN RE:** | ) | |
| **THE JOINT PETITION FILED BY DISH NETWORK, LLC, THE UNITED STATES OF AMERICA, and THE STATES OF CALIFORNIA, ILLINOIS, NORTH CAROLINA, AND OHIO FOR DECLARATORY RULING CONCERNING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA) RULES** | ) | |
| **AND** | ) | |
| **THE PETITION FILED BY PHILIP J. CHARVAT FOR DECLARATORY RULING CONCERNING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA) RULES** | ) | **GC DOCKET # 11-50** |
| **AND** | ) | |
| **THE PETITION FILED BY DISH NETWORK, LLC )FOR DECLARATORY RULING CONCERNING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA)RULES** | ) | |

## Executive Summary of the States[1] Of California, Illinois, North Carolina and Ohio's Comments to the FCC regarding GC Docket 11-50

The issue before the Commission is the matter of assigning liability for calls made in violation of the Do-Not-Call provisions of the Telephone Consumer Protection Act and its Regulations (TCPA). Of particular importance is the interpretation of the phrase "on behalf of" and its associated phrase "on whose behalf" as applied to the Telephone Consumer Protection Act and its Regulations.

The States seek the Commission's confirmation of the definition of the phrases consistent with their plain English meanings and advancing the purposes of the TCPA. The meaning of the phrases is, in fact, so clear that the definitions should be confirmed without consultation of any other law. The confirmation of the definitions, as presented in the State's comment, is imperative to give proper effect to the intents and purposes of the TCPA. Those intents and purposes include the protection of the privacy of those consumers wishing to be free from telephone solicitations as well as the protection of those Sellers who enjoy the benefits of telemarketing while strictly adhering to the TCPA's protections.

The Commission has asked that commentators respond to specific questions and the

[1] Herein and in the comment proper, the term States shall refer to the States of California, Illinois, North Carolina, and Ohio.

States do so here.

*1) Under the TCPA, does a call placed by an entity that markets the seller's goods or services qualify as a call made on behalf of, and initiated by, the seller, even if the seller does not make the telephone call (i.e., physically place the call)?*

The States answer that the TCPA is, and has been held to be, a strict liability statute. For this and all the reasons cited in their comment, the States answer this question in the affirmative. . . Sellers are responsible for calls physically dialed by others when that call markets the seller's goods or services.

*2) What should determine whether a telemarketing call is made "on behalf of" a seller, thus triggering liability for the seller under the TCPA? Should federal common law agency principles apply? What, if any, other principles could be used to define "on behalf of" liability for a seller under the TCPA?*

*Additionally, we solicit comments addressing the applicability of federal agency law and federal joint venture law to the TCPA liability questions presented herein.*

Solely on the basis of the plain meaning of the phrase, Sellers must be held strictly liable when a violative call is made to a person and such a call is made for the purpose of encouraging the purchase or rental of, or investment in the Seller's, property, goods, or services, and the party physically dialing the call identifies itself either as the Seller, or states expressly or by implication that it is acting for the Seller. Sellers derive benefits from third party callers actions. Even if the violative call does not result in a sale, the Seller gets the benefit of having its products or services presented to a group of potential customers denied to its ethical competitors. Since every violative call confers a benefit on the Seller, it must be held responsible for such a call. Since, the TCPA is silent on the application of agency principles or joint venture principles, the invitation to impose them now, where the application of the plain meaning of the term is sufficient, should be declined. Instead, the Commission should enforce the intents and purposes of the TCPA while considering the principle of fairness to consumers and ethical telemarketers.

The State's comment includes specific examples of how, if the meaning of the phrases is inconsistently restricted to mean either only formal agents of the Seller or those "under the direction and control of the Seller", Sellers have and will continue to attempt to skirt liability for violative calls. These Sellers, using shadow armies of callers, have and will claim they have plausible deniability for the acts of the callers while, at the same time, these Sellers benefit from the violations of the TCPA. These benefits which inure to these Sellers hurt both consumers and other Sellers who scrupulously comply with the TCPA.

For all the reasons presented in the comment the States urge the Commission to confirm that the TCPA holds the Seller strictly liable for calls made in violation of the Act, whether physically dialed by the Sellers themselves, their agents or ANY third party, when such call is made to a person for the purpose of encouraging the purchase or rental of, or investment in the Seller's, property, goods, or services, and where the party physically dialing the call identifies itself either as the Seller, or states expressly or by implication that it is acting for the Seller.

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**Comments of the States on behalf of themselves and their Citizens**

These comments are submitted by the States acting on behalf of their sovereign law enforcement interests and on behalf of their residents. This matter is before the Commission, in part, on the Joint Petition of the Plaintiffs and Defendant in *The United States of America, et al. v. DISH Network, LLC.*[2] The Petition was filed pursuant to the Order of Chief Judge Michael McCuskey on February 4, 2011 (Doc. 86). These comments are submitted in response to the Consumer and Governmental Affairs Bureau of the Federal Communications Commission's April 4, 2011 Pleading Cycle Notice in which the Bureau seeks comments on the Questions with respect to the Telephone Consumer Protection Act of 1991 (47 U.S.C. § 227); FCC Regulations (47 C.F.R. §§ 64.1200, *et seq.*).

[2] *The United States of America, and the States of California, Illinois, North Carolina and Ohio. v. DISH Network, LLC.,* Case No. 3:09-cv-03073-MPM-BGC, (C.D. Ill.).

## Introduction

The undersigned urge the Commission to interpret the plain language of the Telephone Consumer Protection Act (TCPA)[3] in a common sense way that confirms that Sellers[4] cannot avoid liability for telemarketing calls by setting up creative marketing structures whereby they do not directly employ the telemarketers but nonetheless reap the benefits of telemarketing. As reflected in the plain language of the TCPA and the regulations promulgated under it, the TCPA does not impose liability only when a Seller directly employs a telemarketer but also when a telemarketer makes calls on that Seller's "behalf." Congress drafted the TCPA with flexibility in mind so that the statute could be applied to evolving situations and technology. The FCC should uphold that principle. Interpreting the TCPA in the unduly narrow way advocated by other parties would simply encourage Sellers to try to avoid complying with the consumer protections the TCPA provides by setting up marketing structures whereby they obtain the same benefits as traditional telemarketing but without directly employing the telemarketers or establishing traditional agency relationships with them. This type of result would harm consumers by not providing sufficient protections from do-not-call violations. Moreover, this policy would also harm companies who are competing fairly, abiding by the law, and taking responsibility for their telemarketing instead of focusing their energies on setting up marketing structures designed to avoid liability.

## Factual Background

Many Sellers abide by the law when they use telemarketing to market their products and services. These Sellers also leave no doubt as to the relationship between the Seller and the physical caller. In these situations, when a telemarketing violation does occur, it is easy to tie the violation back to both the Seller and the physical caller. The industry itself understands that it is the responsibility of Sellers to monitor those who make telemarketing calls which ultimately benefit their bottom line.[5]

However, in other situations, Sellers set up marketing arrangements where the Seller does not directly employ the telemarketer and the relationship between the Seller and the physical caller is not transparent to the consumer. Regardless of the lack of transparency of the relationship, the Seller still gains an advantage from the telemarketing calls that are made. In short, the result is the same - telemarketers solicit the Seller's product or service regardless of whether or not the telemarketers have been directly authorized by the Seller to make the calls and the Seller always receives some direct benefit from the calls made by telemarketers. Even in

[3] 47 U.S.C. 227, see also 47 C.F.R. 64.1200.

[4] "The term [S]eller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encourage the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. 64.1200(f)(7).

[5] DMA Commends FTC on Do Not Call Enforcement, http://www.the-dma.org/cgi/disppressrelease?article=740++++++, (last visited, March 21, 2011).

the case where no sale is made, the Seller receives the benefit of having its name, product or service presented to a potential customer. Some of these scenarios are described below.

For instance, some Sellers intentionally enter into relationships with retailers and other third parties by explicitly creating contractual relationships in which the third parties are not authorized to telemarket the Seller's products or services. These entities, however, do in fact, and for reasons that will be explained in this comment, solicit and sell the Seller's products and services using telemarketing methods.[6] To heap insult on injury, these Unauthorized Telemarketers identify themselves to consumers either as the Seller itself or as "acting on the Seller's behalf," and giving the consumer the impression that the caller is indeed representing the Seller. A portion of those telemarketing calls made by Unauthorized Telemarketers are made in violation of the TCPA's Do-Not-Call provisions and automatic dialer restrictions.

Without regard for how the sales were made, Sellers can profit from the sales and gain subscribers resulting from violative calls. Without regard for how such sales were made, Sellers compensate the physical dialers of the calls for the sales generated. The compensation may take the form of commissions or other incentives.[7]

Sometime later the Seller may be confronted with an inquiry by a consumer, the Better Business Bureau, or a law enforcement or regulatory agency. These Sellers will claim that since they did not specifically authorize or control the telemarketing, they cannot be held responsible for violations made by the physical callers. The Sellers also claim that they cannot stop the Unauthorized Telemarketers from making such calls because they have no way of identifying the actual caller.

Such tactics are designed to frustrate the enforcement of the TCPA and undermine the intent and purpose of that act. The negative results of these tactics extend not only to the enforcement agencies, but to consumers and legitimate Sellers who employ ethical telemarketing protocols and comply with the TCPA's intent. Consumers are cheated of the protection of the Do-Not-Call Registry while the Seller hides behind a thinly veiled disclaimer of liability. Ethical Sellers are likewise harmed when unethical and illegal calls are made, because those calls erode the public perception of telemarketing as a legitimate marketing method while providing an unfair marketing advantage to the Sellers who attempt to avoid TCPA liability.

## Discussion

The TCPA contemplates holding both the physical dialer of the violative call and the Seller of the product solicited and sold, jointly and severably liable for violations.

### Seller as Initiator of a Telemarketing Solicitation

[6] For the purpose of this Comment, these entities that telemarket despite their contractual duties not to telemarket will be defined as Unauthorized Telemarketers.

[7] For a description of some of the benefits one Seller provides for selling its products and services, see United States v Masek, 588 F.3d 1283, 1285-86 (10th Cir. 2009).

According to the regulations promulgated pursuant to the TCPA, a telemarketer is defined as " the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. 64.1200(f)(10). Under the TCPA definition, the entity "intiating" a call is directly liable for compliance with the act's provisions and liable for violations. The sole relevant definition of the term "initiate" as defined by the Oxford online dictionary[8] is to "cause (a process or action) to begin". Where the solely applicable definition of a word is apparent, there is no legitimate justification to look beyond that definition or to construct a new one. For all the reasons discussed below, (e.g. providing compensation for procurement of business without investigating the methods by which such business was procured) a Seller is clearly the entity which causes the process of making telemarketing calls to begin. Without a Seller willing to compensate a third party, no third party would ever engage in making even legal marketing calls in the attempt to sell the Seller's products and/or services. It is incomprehensible to imagine any third party would place itself at risk by making a violative call soliciting the Seller's products and services unless that party knew it would be compensated by the Seller for sales resulting from that call, and that the compensation would be provided without question, and regardless of the methods used to procure that sale. Therefore, even without more, the Seller is ultimately responsible for violative calls as the initiator of the call.

**Calls Made on Behalf of a Seller**

Beyond the liability apportioned to the Seller by the application of the term "initiate", the phrases "on behalf of" and "on whose behalf" (hereinafter "on behalf of") both appear in the TCPA and in various sections of the Act's Regulations.[9] The inclusion of the term "on behalf of" reflects the TCPA's broad view of protecting consumers from unwanted calls and protecting businesses who expect and have a right to a level playing field in regards to enforcement. Indeed, that view is why the phrases must be interpreted in a consistent manner for equitable enforcement of the TCPA's intent.

In addition to the clear legal foundations supporting this position, as recited by the plaintiffs in pleadings and memoranda filed in *The United States of America et al v DISH Network LLC* (supra, footnote 2), the policy reasons cited herein demonstrate that the TCPA must be construed to impose strict liability for violative calls on both the caller and the Seller, regardless of which one physically dialed the call.

The TCPA contains the term "on behalf of" when defining the responsibilities of a Seller under the Act. Except in those cases for which a "Seller" has a "safe harbor"[10] or is an entity

[8] http://oxforddictionaries.com/view/entry/m_en_us1258139#m_en_us1258139 last visited April 22, 2011 (9:32am). The sole remaining definition provided addresses the usage of the term "initiate:" in the context of "admitting" (e.g. to a club).

[9] The TCPA's rules apply equally to the physical dialer of the calls and those persons or entities "on whose behalf" calls are made. The rules also use the language "on behalf of" to communicate the same concept. (see e.g.: 47 C.F.R. § 64.1200(a)(6), (c)(2), (f)(7); see also 47 U.S.C. 227(c)(5)).

[10] 47 C.F.R. § 64.1200 (c)(2).

specifically excluded by the Act[11], there are no protections granted to a Seller for violative acts. There is no dispute that courts have addressed the question of whether the TCPA is a strict liability statute and those courts have answered that question in the affirmative.[12] For the Commission to move away from the plain language strict liability standard with its plain language exceptions and plain language safe harbors, would be to abandon long standing statutory and regulatory interpretation protocols. The plain meaning of the term "on behalf of," when bolstered by the FCC's formal confirmation of that interpretation will give the greatest effect to the purpose of the TCPA.

While the Act itself does not contain a specific statement of purpose, Congress did make certain findings which, when read together, provide the reader with a clear indication of its intent. The TCPA was enacted with the dual purposes of addressing consumer complaints about invasive and nuisance telephone calls from companies attempting to solicit the consumer's business[13] and still allowing reputable and responsible businesses to access potential markets through telephone contact.[14]

The undersigned request that the Commission confirm the most logical and effective interpretation of the term "on behalf of," one which holds Sellers directly liable for violations of the TCPA when a telephone call or message that violates the TCPA is: (i)transmitted to any person; (ii) by a caller identifying the caller as either the Seller, or stating expressly or by implication that the caller is acting for the Seller; and; (iii) for the purpose of encouraging the purchase or rental of, or investment in the Seller's property, goods, or services. This interpretation is consistent with Congress' instruction to the Commission as well as the Commission's own resolution that it will "ensure consumers are not bothered by unwanted,

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[11] 47 C.F.R. § 64.1200 (a)(2).

[12] *CE Design Ltd. v. Prism Business Media, Inc.*, Civ. No. 07-5838, 2009 WL 2496568, at *3 (N.D. Ill. 2009) ("The TCPA is a *strict liability* statute. . ."); see also *Penzer v. Transportation Ins. Co.* 545 F.3d 1303, 1311 (11th Cir. 2008) citing *Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading, PA.*, 314 F.Supp.2d 1094, 1103 (D.Kan.2004) ("The TCPA is essentially a strict liability statute" where liability can be found for erroneous unsolicited faxes).

[13] *Satterfield v. Simon & Schuster, Inc.* 569 F.3d 946, 954 (9th Cir. 2009) *citing S.Rep. No. 102-178,* at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968. *finding* "The TCPA was enacted in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls" and "consumers complained that such calls are a "nuisance and an invasion of privacy."" *See also*: FCC Fact Sheet (internet citation): "Congress first passed the Telephone Consumer Protection Act (TCPA) in 1991 in response to consumer concerns about the growing number of unsolicited telephone marketing calls to their homes and the increasing use of automated and prerecorded messages. In response, the Federal Communications Commission (FCC) adopted rules that require anyone making a telephone solicitation call to your home to provide his or her name, the name of the person or entity on whose behalf the call is being made. . ."

[14] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum and Opinion Order*, FCC 95-310, CC-Docket 92-90 (adopted July 26, 1995: released August 7, 1995) *noting* "Congress' instruction that '[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.'"

intrusive calls to their home" and continue the vigilant enforcement of the TCPA's regulations.[15] With the Commission's confirmation of that fact, those Sellers will not be able to gain the unfair advantage provided by the actions of a shadow army of telemarketers who ignore the TCPA.

**Sellers' Attempts to Avoid TCPA Liability**

Since the enactment of the TCPA, some Sellers have looked for ways to gain the benefit of access to potential customers who have placed their phone numbers on the Do-Not -Call list while avoiding liability for calls made in violation of the TCPA.

Sellers have used shadow armies of callers to shield themselves from TCPA liability in one of three ways. In the first, the army is comprised of callers that appear to be exempt from the regulations. This approach is demonstrated by the positions taken by the physical dialer of the calls and Seller in the Missouri "Dove Foundation" (Dove) Settlement.[16] In the second approach, the Seller directly or indirectly employs methods of concealing the actual identity of the physical dialer or Seller and, knowing that huge amounts of resources must be expended to determine who physically dialed the call, has little fear of being caught. In the third scenario, the Seller creates a climate in which it is mutually advantageous for this army to exist. The Seller creates a business model that allows it to profit from illegal tactics. It does this by passively profiting from the acts of the shadow army and actively avoiding acknowledging possible TCPA violations.

The undersigned respectfully urge the Commission to avoid any interpretation of the term "on behalf of" which allows the Seller to simply claim a defense based on "plausible deniability". Without a confirming statement of the law, Sellers availing themselves of the army's "protection" would simply claim that the army was not acting on its behalf.

One striking example of what can happen when a shadow army is created to operate outside the law can be seen in the Dove enforcement action brought under Missouri's enforcement of its own Do-Not-Call statute, a statute analogous to the TCPA. In that case, the Seller, Feature Films For Families, Inc. (Feature), a Utah company that sells "family friendly" DVDs and videotapes, benefitted from Dove's calls to consumers, some of whose names appeared on the Missouri Do-Not-Call database. Dove claimed an exemption from Missouri's Do-Not-Call prohibitions because it was a charitable institution. The Missouri Attorney General argued that when a charitable organization is clearly establishing a business relationship for a third party, its exemption cannot be used for purposes of making calls that another telemarketer could not make.

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[15] *Statement of Enforcement Bureau Chief David H. Solomon On First FCC Enforcement Action under The National Do Not Call Registry,* FCC News Release, December 18, 2003. http://www.fcc.gov/eb/News_Releases/DOC-242324A1.html

[16] *Company selling films used non-profit organization as front to try to circumvent state No Call law, Nixon says,* March 27, 2006. Press Release from the Missouri Attorney General http://ago.mo.gov/newsreleases/2006/032706.htm:

Other methods designed to circumvent the TCPA involve a Seller that creates a business model whereby it authorizes a cadre of so-called independent retailers to solicit, for compensation, sales of the Seller's products and services. The Seller admonishes these retailers that they are not the Seller's agents and are not allowed to use telemarketing to sell the Seller's products and services.

In one version of the Seller-retailer business model, the retailer contacts consumers directly without serious attempts to comply with the TCPA, thereby generating customers for the Seller. The retailer knows from experience that the Seller will accept customers, and compensate the retailer for such customers, without inquiry into the solicitation method. A flow chart of this scenario is attached to this Comment as Example 1 as a visual aid.

In yet another version of the Seller-retailer business model, there are two variations involving the retailer reliance on outside third parties. The first is where the retailer obtains a list of prospects from a "lead generator" and then contacts those prospects. The second variation is where the retailer employs an entity that either directly telemarkets customers and develops prospects from that activity or calls prospects provided by the lead generator. In either case, some of the prospects may have listed their telephone numbers on the Do-Not-Call Registry and some of those prospects agree to the purchase. After identifying the willing customer; and in order to effectuate the sale of the Seller's products and services, the retailer will, depending on the terms of its agreement with the Seller, either: (i) refer customers directly to the Seller to purchase the Seller's products and services; or (ii) directly enter new customers into the Seller's customer order system. In order to determine which retailer from among numerous retailers is entitled to compensation for a particular sale, the retailer responsible for each sale must be identified, either by the customer or by the retailer itself. In these cases, the Seller does not attempt to learn the solicitation method used for any particular sale by any particular retailer. A flow chart of this scenario is attached to this Comment as Example 2 as a visual aid.

Often, Sellers are advised of consumers complaints about violative calls by law enforcement, the Better Business Bureau, or directly from the aggrieved consumer. In response to such complaints, the Seller may claim that it is unable to determine who is responsible for the alleged violative call.

In order to avoid frustrating the intent of the TCPA, including as described in the above scenarios, the undersigned respectfully urge the Commission to give the "on behalf of" language in the Telephone Consumer Protection Act its clearest meaning. By confirming this meaning, the Commission will send an unequivocal message that even the use of a shadow army creates no insulation from Seller liability under the TCPA's provisions.

**DISH's Position**

Notwithstanding all of the logical and principled reasons for not doing so, DISH has, in its Petition to the Federal Communications Commission in this matter, adopted a position that the "on behalf of" language should either solely include callers with whom a Seller maintains a

formal agency relationship or callers who operate under DISH's direction and control.[17] There is no language in the TCPA that expressly or impliedly requires a formal agency relationship between the Seller and the physical caller. For that reason alone, the Commission is urged to reject any such self serving interpretation. The States have demonstrated that the plain meaning of the statute and regulations places liability both on the Seller and the physical dialer the of violative calls made with the intent to solicit and sell its products. For the reasons previously discussed, there is no need to consult additional law to confirm the meaning of the language.

**Public Policy and Fairness Principles**

The determining factors for triggering liability under the TCPA and holding the Seller responsible for the acts of third parties making violative calls are the most consistent, logical and simple to apply. Where a consumer identifies a Do-Not-Call violator as having represented itself as the Seller or as having stated expressly or by implication that it was acting for the Seller, and then solicits the consumer to purchase the Seller's products or services, and no "safe harbor" or exemptions apply, both the Seller and the caller must be held strictly liable for such call.

Public policy and fairness principles support such an interpretation. Consumers who receive violative calls should not have their protections denied simply because the Seller uses third parties to expand its customer base and then disclaims responsibility for that party's bad acts. Further, when the caller has obfuscated its name, phone number, or identity, it should not fall to the aggrieved consumer or to law enforcement agencies to try to discern the identity of such callers. This is especially unacceptable when, by simple questioning of new customers as to whether the customers were solicited by telemarketing and if so, whether the customer was on the Do-Not-Call list, would readily identify those third parties guilty of making violative telemarketing calls. Shifting the burden for identifying wrongdoers from the beneficiary of the illegal call, to those harmed makes no sense, and undermines the purposes and intent of the TCPA.

"On behalf of" must be defined to guarantee and reinforce the rights of the groups that the Act intended to benefit. There remains a group of consumers who do want conveniently presented information about companies and cost saving offers which they may miss unless ethically and legally marketed by reputable companies or their surrogates.[18] The clear definition of the term "on behalf of" as set out in the TCPA and for which the undersigned requests confirmation from the Commission, is in fact tailored narrowly enough so as to ensure that those consumers who want the information can take advantage of the convenience of a telemarketing call while still protecting those who do not want calls regardless of the source.

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[17] DISH Network, L.L.C.'s Petition for Clarification and Declaratory Ruling, Joint Petition of DISH Network, LLC and the United States, the States of California, Illinois, North Carolina and Ohio for an Expedited Clarification of and Declaratory Ruling on the Telephone Consumer Protections Act of 1991. CG Docket Number 11-50, File/Accepted March 41. 2011. At pages 2, 9, 16-18.

[18] Odell, Patricia, DNC's Silver Lining, "Promo", Penton Media, Inc Dec 1, 2003 12:00 PM. , http://promomagazine.com/legal/marketing_dncs_silver_lining/ Last visited April 22, 2011 (7:51am). "There are still lots of people who have not registered their numbers because they don't mind receiving calls. In fact, some of them like receiving calls."

**Consumers Rely on the Do-Not-Call List to Protect Their Privacy**

Allowing companies to skirt the Do-Not-Call regulations by simply using surrogates to shill for them is unconscionable and in direct abrogation of the intent of Congress. To confirm that Do-Not-Call listed consumers are still incensed at having their privacy invaded by unethical and arrogant telemarketers, one merely has to look at any website dedicated to consumer complaints about telemarketing.[19]In addition, there are literally millions of reports made each year to the Federal Trade Commission ("FTC") and state Attorneys General about unwanted telemarketing calls.

The TCPA's privacy protections cannot be undermined by accepting an unrealistically narrow and self-serving interpretation. To do so would insulate a Seller from liability even when that Seller, having already benefitted from the making of the violative calls, simply sticks its head in the sand and pretends it has no idea of what is happening yet, at the same time, the Seller compensates those who violate the law while creating an unlevel playing field and penalizing those who play by the rules.

**Businesses Rely on Telemarketing**

Although the conventional wisdom takes the position that the real benefits of strict adherence to the Do-Not-Call list primarily inure to consumers, there is an undeniable benefit that accrues to businesses that rely on telemarketing. There is little doubt that calls to numbers that appear on the Do-Not-Call list hurt not only the consumers whose privacy is invaded, but also undermine the telemarketing community as a whole by creating an untrue stereotype that all companies that directly or indirectly benefit from telemarketing are acting in an illegal or unethical manner.

According to the Direct Marketing Association's (DMA) website, the DMA is "the leading global trade association of businesses and nonprofit organizations using and supporting multichannel direct marketing tools and techniques."[20] Despite its earlier opposition to the establishment of the Federal Do-Not Call list[21], by 2005, the DMA's position about the benefits of compliance and enforcement of the regulations governing the list included the realization that those regulations apply to companies and their surrogates, and provide significant benefits to ethical direct marketers.[22] The DMA commended the FTC for its strong commitment to the

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[19] e.g. 800notes.com and Callcenter.com.

[20] What is the Direct Marketing Association, http://www.the-dma.org/aboutdma/whatisthedma.shtml (last visited, March 21, 2011).

[21] Telemarketing: DMA promises fight on FTC's do-not-call list, http://adage.com/article/news/telemarketing-dma-promises-fight-ftc-s-call-list/50696/, (last visited March 21, 2011.

[22] DMA Commends FTC on Do Not Call Enforcement, http://www.the-dma.org/cgi/disppressrelease?article=740++++++ (last visited, March 21, 2011).

enforcement of Do-Not-Call rules and statutes. Patricia Kachura, at the time DMA's, senior vice president for ethics and consumer affairs, lauded the FTC's 2005 enforcement action against DirecTV's "actions [which] should serve as a cautionary tale for companies. . .When you hire someone to sell on your behalf, you are trusting those companies with your own corporate brand and reputation . . . Companies need to be aware of what is happening with partners, vendors and other suppliers of marketing services, and make sure they are conducting their business in an ethical and legal manner."[23] DMA indicated its comments echo and clarify the industry's understanding of the comments of then "FTC chairwoman, Deborah Platt Majoras, who stated that "sellers are on the hook for calls placed on their behalf. . ."[24] Kachura went on to state that "[p]laying by the rules means obeying both the letter and the spirit of the law. . . Those few companies that do not respect consumers' wishes reflect badly on the image of the industry as a whole."[25]

Clearly, as early as 2005, industry leaders realized that there are benefits to universal compliance with and enforcement of the telemarketing laws. Among these benefits is the preservation of the reputations of businesses that legally and ethically use telemarketing as part of their marketing strategy. These leaders also realized that the Do-Not-Call regulations are written and intended to place full responsibility for the acts of people soliciting business for a Seller on that Seller.

## Conclusion

For all the above reasons, the States urge the Commission to adopt an interpretation of the TCPA which, first, identifies the Seller as the initiator of the call. Thereafter, the States urge the Commission to confirm that the phrases "on behalf of" and "on whose behalf" which, subject to statutory exceptions and safe harbors, hold the Seller strictly liable for calls made in violation of the Act, whether physically dialed by the Sellers themselves, their agents or ANY third party, when such call is made to a person and made for the purpose of encouraging the purchase or rental of, or investment in the Seller's, property, goods, or services, and where the party physically dialing the call identifies itself either as the Seller, or states expressly or by implication that it is acting for the Seller.

[23] Id.
[24] Id.
[25] Id. (Emphasis added)

The foregoing comment is respectfully submitted, this the 4th day of May, 2011

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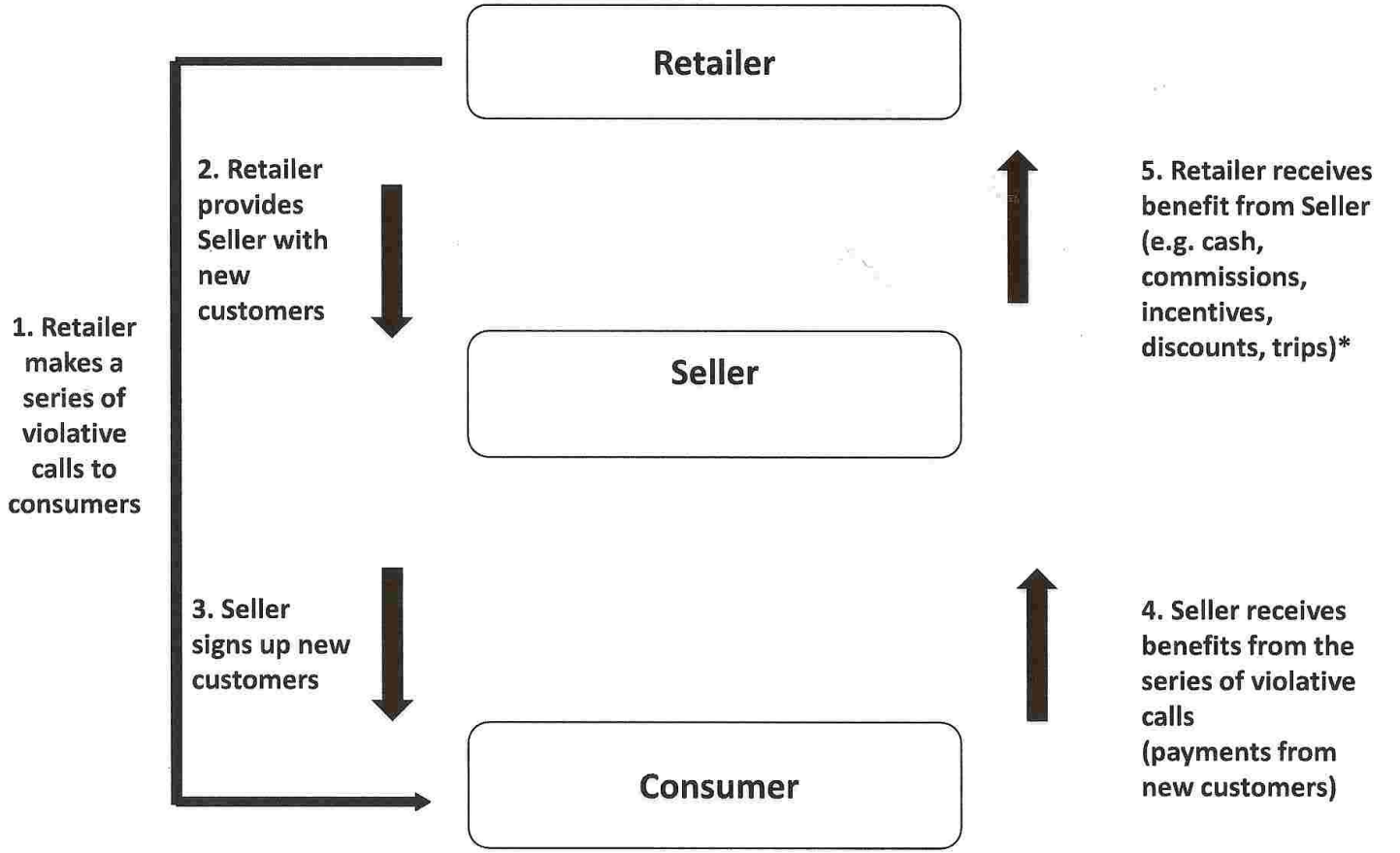
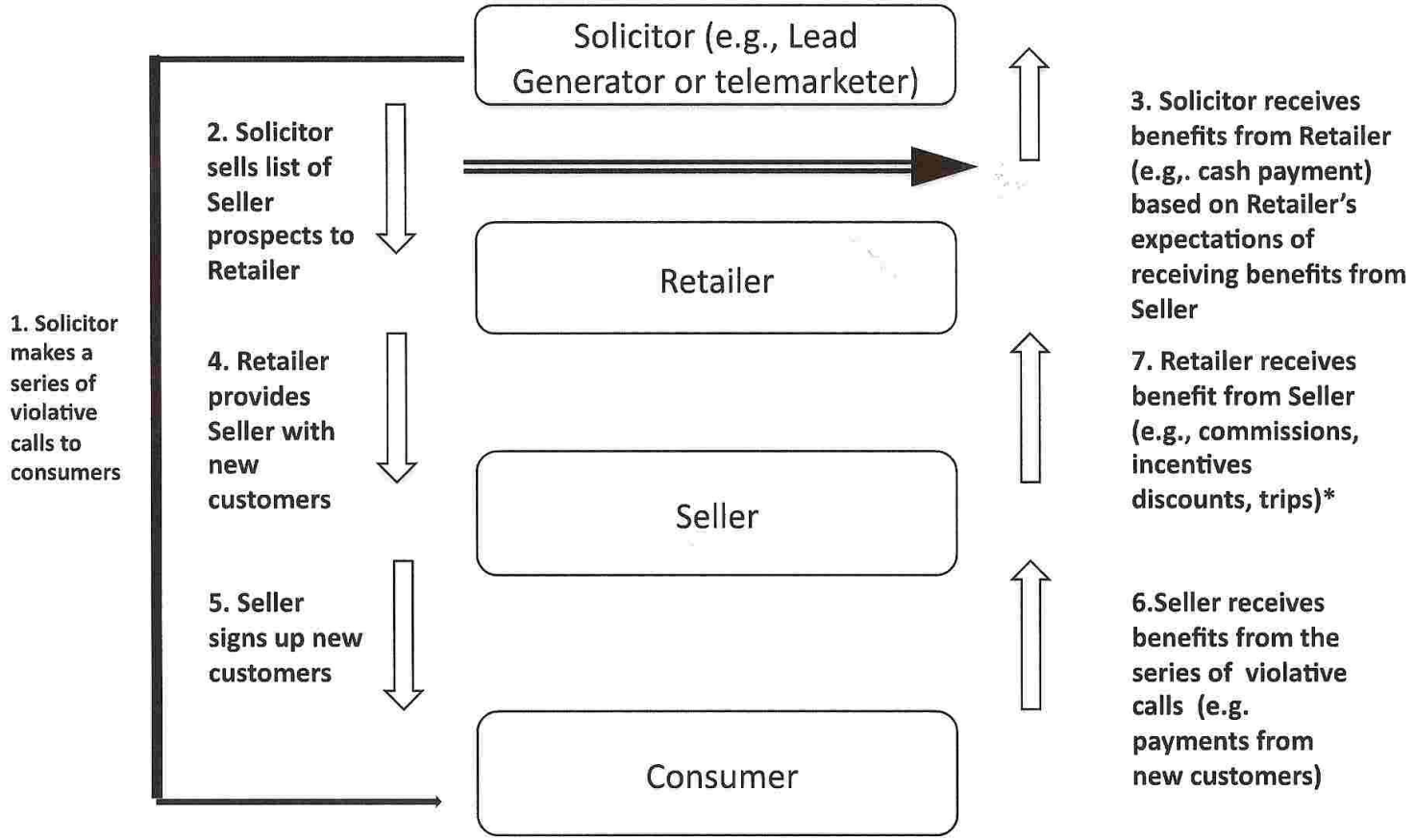
**Example 1: Flow of Acts and Benefits Where Retailer Obtains Customers Directly**




•For a description of some of the benefits one Seller provides for selling its services, see United States v Masek, 538 F.3d 1283, 1285-86 (10th Cir. 2009)

**Example 2: Flow of Acts and Benefits Where Retailer Hires or Uses 3rd Party Solicitors**




•For a description of some of the benefits one Seller provides to third parties for selling its services, see United States v Masek, 538 F.3d 1283, 1285-86 (10th Cir. 2009)